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he returned to his same work at an increase, must be deemed excessive to the amount of \$5,000, though, in view of the decreased purchasing power of money, the verdict will be upheld to the amount of \$10,000, though it was double the average verdict for such injuries.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 187, et seq.]

25. Appeal and Error (§ 1151 (2)*)—Appellate Court Can Fix the Amount of Damages.—Where there was no question as to defendant's liability, although the verdict, possibly because of improper argument of counsel, was excessive, the appellate court, instead of reversing the judgment under Code 1919, § 6365, solely for assessment of damages, may determine that issue itself, being in as good a situation as a jury.

[Note.—For editorial comment, see 6 V. L. R., N. S., 619.]

Error to Law and Equity Court of City of Richmond.

Action by Bryan Clay against P. Lorillard Company, Incorporated. Judgment for plaintiff, and defendant brings error. Amended and affirmed.

S. S. P. Patteson and McGuire, Riely, Bryant & Eggleston, all of Richmond, for plaintiff in error.

Hundsor Cary, of Richmond, for defendant in error.

JEFFRESS *v.* VIRGINIA RY. & POWER CO.

Sept. 16, 1920.

[104 S. E. 393.]

1. Appeal and Error (§ 362 (2)*)—Where Petition Substantially Points Out Errors, Writ Will Not Be Dismissed.—Although Code 1904, § 3464, Code 1919, § 6346, provides that the petition for writ of error shall assign errors, a writ will not be dismissed on that ground, though the petition did not in specific terms comply with the provision, where it contained a comprehensive discussion of the rulings on evidence and instructions, etc., and the rulings were shown and challenged by separate bills of exception specifically referred to.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 581, et seq.]

2. Electricity (§ 14 (1)*)—Standard of Care Must Be Measured By the Danger.—Where plaintiff asserted that an electric company furnishing him with current was responsible for the firing of his house, it being his contention that at the time fuses were blown out during a storm the transformer was injured and that electric company neg-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ligerly failed to discover the defect, instructions consistently stating that it was the company's duty only to use ordinary care, having regard to the nature of electricity, were misleading, and the jury should have been informed that the care must be graduated and measured by the danger.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 55, et seq.]

3. Negligence (§ 121 (1)*)—Burden of Proof on Pleader.—He who charges lack of ordinary care must prove it.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 402, et seq.]

4. Electricity (§ 19 (3, 4)*)—General Usage Governs, as to Care Required, but Presumption May Be Rebutted By Evidence.—While the general usage of electric companies furnishes a presumptive standard as to the care required, the presumption may be rebutted; hence in an action against an electric company, which plaintiff claimed was negligent, in that its servants failed to properly test a transformer on replacing a fuse blown out in a storm, although the company had been notified that after the lights went out a dull glow remained, it was improper, despite proof that the test made was the ordinary one, to exclude evidence tending to show that it was an insufficient test to disclose defects in the transformer which would allow dangerous current to pass through.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 55, et seq.]

5. Electricity (§ 14 (3)*)—Duty of Care.—Persons engaged in the development and distribution of electricity owe to their customers and others who for business or pleasure have the right to be in reach of the current, the duty of exercising ordinary care to avail themselves of the best materials and best mechanical contrivances and inventions which are in practical use to prevent personal or property injury.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 55, et seq.]

6. Appeal and Error (§ 1064 (1)*)—Erroneous Instruction on Reasonable Care Held Prejudicial in View of Excluded Evidence.—Where plaintiff claimed that, because of the negligence of the employes of an electric company in testing a transformer when they replaced a blown-out fuse, a dangerous current was allowed to enter his house, and caused a conflagration, and the electric company asserted that it used the ordinary test, an instruction that the sole test of ordinary care was common usage, and that if the company used a test in common use it was not negligent, coupled with the refusal to allow plaintiff

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to prove that the test was not adequate, amounted to prejudicial error.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 355, et seq.]

7. Appeal and Error (§ 1026*)—Errors Must Be Prejudicial to Warrant Reversal.—Errors must be prejudicial to warrant reversal.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 582, et seq.]

8. Appeal and Error (§ 692 (3)*)—Excluded Questions Considered, Though Answers Not in Record.—Though the record did not show what the answers of the witnesses would have been, the exclusion may be reviewed when the trial court knew and fully understood what testimony was to be elicited, and on motion for new trial plaintiff asked permission to call the witnesses whose testimony was excluded, and defendant agreed that their testimony would be as claimed.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 559, et seq.]

9. Damages (§ 105*)—Measures for Destruction of Building, etc., Owner May Recover Value.—In an action against an electric company for the burning of a residence, destruction and injury to personal property and shade trees, the measure of damages is the value of the property destroyed; it appearing that it had no regular market value.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 191, et seq.]

10. Trial (§ 105 (2)*)—Where Defendant Made No Objection to Proof of Value of Property, That Furnishes Standard.—In an action for the burning of a residence, injury to shade trees, etc., where defendant made no objection to proof of value of the property without any showing as to market value, such value furnishes the standard for assessment of damages.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 191, et seq.]

Error to Hustings Court of Richmond.

Action by Thomas F. Jeffress against the Virginia Railway & Power Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

Miller & Miller and *C. V. Meredith*, all of Richmond, for plaintiff in error.

H. W. Anderson and *E. R. Williams*, both of Richmond, for defendant in error.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.